



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 33540 / 2017

1) REPORTABLE: YES / <u>NO</u>
2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
3) REVISED.
SIGNATURE <u>[Signature]</u>
DATE <u>31 May 2019</u>

CP MOKHEMISA obo M

Applicant

And

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

THE ACTING REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL

Second Respondent

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL

Third Respondent

THE ROAD ACCIDENT FUND

Fourth Respondent

JUDGEMENT

M Snyman, AJ

Relief sought

- [1] The applicant seeks an order reviewing and setting aside a decision of the third respondent (*"the Appeal Tribunal" or "Tribunal"*) that the injuries suffered by the minor child as a result of a collision in which he was involved, did not qualify as a serious injury as contemplated in Regulation 3 of the Regulations issued in terms of the Road Accident Fund Act 56 of 1996, as amended (*"the Regulations"*). An order referring the matter to a newly constituted Appeal Tribunal and costs are also sought.

Brief Background

- [2] After having submitted a claim, the applicant instituted an action against the Road Accident Fund (*"the Fund"*) on behalf of her minor child under case number 66120/2015 for the injuries sustained after the child was involved in a motor vehicle collision on 9 March 2013, at the time 5 years old and already in grade R.
- [3] The applicant claims on behalf of her minor child who was born during 2007. In 2013, the year of the accident, the minor child was 6 years old. At the outset it should be noted that a child is only obliged to attend school the year he/she turns 7. Grade R is the preparatory year that a child is obliged to attend before starting school in Grade 1. A child is therefore obliged to attend Grade R in the year he/she turns 6 years old. The minor was, according to the Psychologist's report on which the Tribunal relies already in grade R, the year before the accident. The importance hereof will become clear hereunder.
- [4] The applicant *inter alia* claimed for "non-pecuniary damages" (also referred to as "general damages") suffered as a result of the injuries sustained by the minor child.

Legal Framework

- [5] In order to claim for and be compensated for any non-pecuniary damages, the minor child had to be examined by a medical practitioner who must then complete a Serious Injury Assessment Form (RAF 4) indicating that the person claiming, suffered from a Whole Person Impairment (WPI) as set out in the Regulations of more than 30%, alternatively on a narrative test, suffered from a serious injury as prescribed.

- [6] The applicant obtained and submitted the RAF 4 forms as contemplated in section 17 and read with Regulation 3 of Act, to the Fund.

- [7] Regulation 3 prescribes the method contemplated in section 17(1A) for the determination of "serious injury".

- [8] As a starting point regulation 3(1)(a), stipulates that a third party who wishes to claim general damages (referred to in the Regulations as "non-pecuniary damages") *"shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations"*.

- [9] Regulation 3(3)(a) requires that a third party who has been so assessed, *"shall obtain from the medical practitioner concerned a serious injury assessment report"*. This is defined as a duly completed RAF 4 form.

- [10] The RAF 4 form itself, read with regulation 3(1)(b), requires the medical practitioner to assess whether the third party's injury is "serious" in accordance with three sets of criteria:

- (a) In terms of regulation 3(1)(b)(i), the Minister may publish a list of injuries which do not qualify as serious. In 2013 such a list was published when the rules were amended. If the third party's injury falls within that description, it shall not be assessed as serious.
- (b) Regulation 3(1)(b)(ii) provides that the third party's injury must be assessed as "serious" if it "resulted in 30 % or more Impairment of the Whole Person as provided in the AMA Guides", which is defined in Regulation 1 as the "American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition".
- (c) If an injury does not qualify as "serious" (i.e not reach a 30 % impairment) in terms of regulation 3(1)(b)(ii), it may nonetheless be assessed as serious under the so-called "narrative test" provided for in regulation 3(1)(b)(iii), if that injury:
 - (i) resulted in a serious long-term impairment or loss of a body function;
 - (ii) constitutes permanent serious disfigurement;
 - (iii) caused severe long-term mental or severe long-term behavioural disturbance or disorder; and
 - (iv) the loss of a foetus.

[11] In terms of regulation 3(3)(c), the Fund is only liable for payment of general or non-pecuniary damages if: -

- a) a claim is supported by a RAF 4 form submitted in terms of the Act and the Regulations; and
- b) the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the Regulations.

[12] If the Fund is not satisfied that the assessment was done correctly it must, either: -

- a) reject the third party's RAF 4 form and give its reasons for doing so; or
- b) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in regulation 3(1)(b).

[13] Regulation 3(4) provides for an appeal process should the third party dispute the Fund's rejection of the RAF 4 form (under regulation 3(3)(d)(i)) or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under regulation 3(3)(d)(ii)).

[14] The aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form ("RAF 5") with the registrar of the Health Professions Council within 90 days of being informed of the rejection or the impugned assessment. Regulation 3(5)(a) then goes on to say that if this is not done within the time period prescribed or such longer period as may be granted on condonation by the Tribunal, the rejection of the RAF 4 form or the

assessment by the Fund's designated medical practitioner, as the case may be, shall become final and binding.

- [15] If a dispute is declared as prescribed, Regulation 3(8) provides for the determination by an Appeal Tribunal of three (3) independent medical practitioners with expertise in the appropriate area of medicine, appointed by the registrar of the Health Professions Council.
- [16] In terms of regulation 3(13), the determination by the Appeal Tribunal is final and binding. A procedure by which the Appeal Tribunal enquires into the dispute is laid down in detail by regulations 3(4) to 3(13). It includes *inter alia*, the following features:
- a) Both sides may file submissions, medical reports and opinions.
 - b) The Appeal Tribunal may hold a hearing for the purpose of receiving legal argument by both sides and seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing.
 - c) The Appeal Tribunal has wide powers to gather information, including the power to direct the third party to submit to a further assessment by a medical practitioner designated by the Tribunal; to do its own examination of the third party's injury; and to direct that further medical reports be obtained and placed before it.
- [17] What is clear from the forgoing, and taking into consideration the purpose of the Appeal Tribunal, i.e., to ascertain whether the serious injury assessment

was done correctly in order to qualify for a claim for general damages, is an assessment by the Tribunal of the medical expert's findings.

- [18] From the Regulations it is clear that the RAF 4 form must be completed by a medical practitioner. In *Duma v RAF*,¹ the Supreme Court of Appeal found that a person not so registered as a medical practitioner may not complete a valid RAF 4 serious injury report. It is however not a requirement of the Regulations that the RAF 4 form be completed by an expert in the specific field of assessment. The result is that a general practitioner may complete the form and conclude that the claimant suffered a serious brain injury without the assessment having to be done by a Neurosurgeon, Neurologist or a Psychiatrist.
- [19] The Appeal Tribunal on the other hand, as stated above, must consist of medical practitioners in the relevant field of expertise. This can only mean that the expertise must be ascertained having regard to the injuries sustained by the claimant.
- [20] The logic behind this seems clear. The Appeal Tribunal must consist of medical experts in the relevant field in order to assess the correctness of the conclusion of the medical practitioner completing the RAF 4 form as the person completing the form need not be such expert.
- [21] What is furthermore clear, is the fact that the panel consists of experts in the particular medical field. These experts are not experts in the assessment of

¹ *Duma v RAF* 2013 (6) SA 9 (SCA)

fact, but may report on what they find. One would therefore expect that a medical practitioner will, in his expert report or in the RAF 4 serious injury report, indicate that there are signs of previous injuries, surgical procedures, scarring, fractures according to physical observation, X-ray reports, et cetera.

[22] The medical practitioner completing the RAF 4 form and the Appeal Tribunal is called upon to, as medical experts, give an opinion on the seriousness of the injury by assessing the current condition of the claimant. The medical practitioner completing the RAF 4 form is more often than not, the expert who will testify on behalf of one of the parties. In that sense he/she is an expert in the true sense of the word.

[23] In Zeffertt and Paizes *The South African Law of Evidence*² the learned authors, citing an English judgment of *National Justice Compania Navierasa v Prudential Assurance Co Limited* 1993 (2) Lloyd's Reports 68 at 81, set out the duties of an expert witness, as follows:

- "1. Expert evidence presented to the Court should be, and should be seen, to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;*
- 2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise . . . An expert witness should never assume the role of an advocate;*

² *The South African Law of Evidence* 2ed, at 330; also referred to by Legodi, J in *Nonyane v RAF* (3126/2016) [2017] ZAGPPHC 929 (10 November 2017) at para [6]; see also *Twine and Another v Naidoo and Others* [2018] 1 All SA 297 (GJ) para [18] (per Vally, J) *Bee v RAF* 2018 (4) SA 366 (SCA) par [22]-[23] (minority judgement of Seriti, AJ)

3. *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;*
4. *An expert witness should make it clear when a particular question or issue falls outside his expertise;*
5. *If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."*

[24] In the matter of Schneider N.O.³ the court found that the duty of a expert is the following:

"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is

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Schneider NO & Others v AA & Another 2010 (5) 203 WCC

dictated by the scientific knowledge which that expert claims to possess."

[my underlining]

[25] In the matter of *Mathebula v RAF*⁴ Meyer, J stated that "an expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence".

Wepener, J in *Nicholson v Road Accident Fund*⁵ quoted a passage in *S v Gouws*⁶, which stated that "the prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal [court] which has to determine the issue to be tried".[my insert]

[26] In court proceedings an expert is there for the court and not for one of the parties. The basis for the expert's opinion and report relates to a specific set of facts either provided to him by the relevant party or upon the finding by court.

[27] Should there be a dispute of fact, the court should enquire from the relevant expert whether his/her opinion would change, should the court make a certain

⁴ *Mathebula v RAF* (05967/05) [2006] ZAGPHC (unreported)

⁵ *Nicholson v Road Accident Fund* (11453/2007) 2012 SGHC (unreported)

⁶ *S v Gouws* 1967 (4) SA 527 528D

finding in respect of the disputed set of facts. As such the experts gives guidance to the court as to what the opinion would be should a certain finding be made on the facts. It is the duty and purpose of a Court after having heard the direct evidence as well as the opinion evidence of the experts based on the facts before court.

[28] It is therefore hardly surprising that the Supreme Court of Appeal in the matter of *The Road Accident Fund Appeal Tribunal and Others v Gouws and Others*⁷ concluded that it is not within the jurisdiction of the tribunal to assess causality.⁸

[29] At paragraph [33] of the *Gouws* judgement, the Supreme Court of Appeal clearly states that the medical practitioner who conducts the initial assessment of the seriousness may express a view on whether the injury was caused by the collision. Such a view is clearly based on the information made available to him at the time, but he cannot make a finding of fact so as to state that the injury sustained during the relevant collision did not contribute to the current injury or sequelae.

[30] I am of the view that the Tribunal is in no better a position than such an expert. The Tribunal in this matter did not receive any representations from the Fund, did not call for any evidence to be placed before them or any representations to be made, did not themselves examine the claimant or had the claimant examined by an independent expert.

⁷ *The Road Accident Fund Appeal Tribunal and Others v Gouws and Others* 2018 (3) SA 413 (SCA)

⁸ Paras [31], [33], [34], [35] and [36]

Finding by Tribunal

- [31] The Tribunal relied on a report of a psychologist, not a medical practitioner, who referred in that report to a letter from a Grade R teacher of the minor during 2012, without even having regard to the content of the letter or the letter being before them.
- [32] The Tribunal found that having regard to the content of the letter to the effect that the child has pre-existing problems, he did not suffer a serious injury. As a result, they made a finding that the condition of the minor or injuries sustained are not causally connected to the collision in which the minor was injured.

Constitution of the tribunal

- [33] Furthermore, the Registrar of the Health Professions Council must appoint 3 experts in the relevant field of expertise, as set out above. To those members so appointed he/she may appoint one further advisor.
- [34] The Registrar appointed 3 Orthopaedic Surgeons and a Neurosurgeon. It is not indicated who are the 3 appointed members of the Tribunal and who is the advisor. The injuries suffered by the minor are not, according to the hospital record provided and those documents submitted to the Tribunal, Orthopaedic in nature, but is a head and brain injury.
- [35] On the face of it and having regard to the requirement that the members of the Tribunal must be appointed from experts in the relevant field, the Tribunal is not correctly constituted.

Review

- [36] The applicant relies *inter alia* on an error of law, an error of fact, as well as on a failure on the part of the majority of the Tribunal to apply the narrative test correctly and properly on the available evidential material.
- [37] The grounds for review are cast in wide terms and are adequate to conclude that the decision is reviewable.

Conclusion

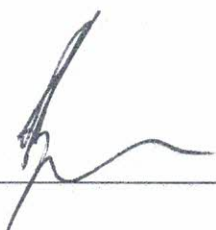
- [38] I found that the Tribunal was not correctly constituted, being more than 3 members.
- [39] This Tribunal made findings of fact and causality which it could not and furthermore that the Tribunal consisted of experts, even if correctly constituted, who are not experts in the relevant field of expertise.
- [40] The Tribunal made findings of fact and/or causality which is not in law authorised or capable of doing.
- [41] As a result, the application must succeed.
- [42] Mr Hugo for the respondent submitted that, should I conclude that the Tribunal could not make the findings in respect of causation, I should set aside the decision and refer the matter to the court for determination of the causality.

- [43] I am of the view that, attractive as it may be, the court cannot make a finding without the Tribunal first dealing with the matter properly.

Order

- [44] The decision of the 3rd respondent dated 28 October 2016 that the applicant's minor child did not suffer as serious injury as contemplated in section 17(1A) of the Road Accident Fund Act, 56 of 1996, as amended as read with the Regulations issued thereunder, is reviewed and set aside;
- [45] The 2nd respondent is directed to re-appoint a new tribunal, properly constituted as set out in Regulation 3(8), i.e, consisting of only 3 members and if needs be, one advisor, and in the appropriate fields of expertise;
- [46] The re-constituted Tribunal is ordered to allow the applicant to be represented at the hearing and make submissions and provide such further evidence, documents as she wishes to;
- [47] The first respondent is ordered to pay the costs of the application.

BY ORDER


A handwritten signature in dark ink, consisting of a stylized 'A' followed by a horizontal line and a wavy flourish, is written over a horizontal line.

M SNYMAN, AJ

Counsel for Applicant:	Adv PA Venter
Applicant's Instructing Attorneys:	Van Zyl Le Roux Inc
Counsel for First Respondent:	Adv M Hugo
Respondents' Instructing Attorneys:	Mbowane Attorneys